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The Kroger Company and United Food and Commercial Workers Union Local 1059, AFL-CIO.
Cases 9-CA-39712 and 9-RC-17712

June 30, 2004

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On May 14, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order only to the extent consistent with this Decision.

I. INTRODUCTION

On September 27, 2002,² the Union filed a petition to represent all regular full-time and part-time employees at the Respondent's refill center in Groveport, Ohio. The Regional Director approved a stipulated election agreement on October 7 that excluded from the bargaining unit, *inter alia*, "all office clerical employees." The Union filed unfair labor practice charges on October 28, pursuant to which a complaint and notice of hearing is-

¹ The Respondent excepts only with respect to the administrative law judge's finding that employee Spetnagel is an office clerical employee. The General Counsel has not filed exceptions. In the absence of exceptions, the Board adopts the other findings of the administrative law judge, including the findings regarding the other challenged ballots and the 8(a)(1) violations and identical objections.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility findings, we note that, although the judge stated that he discredited the testimony of Respondent's Facility Manager Griffin with respect to Spetnagel's duties, he appears to have implicitly credited Griffin's testimony on cross-examination concerning the number of telephone calls the facility receives in a day and that answering telephone calls is Spetnagel's primary responsibility. In making our findings, we do not rely on Griffin's discredited testimony regarding Spetnagel's duties.

² Unless otherwise stated, all dates are in 2002.

sued.³ The representation election was held on October 31. The tally of ballots shows 14 for and 10 against the Union, with 5 challenged ballots. The Union filed objections to the election that tracked its unfair labor practice charges, as well as challenges to the ballots of five individuals. On February 18, 2003, the unfair labor practice case was consolidated for hearing with the Union's challenges to the five ballots and objections to the election. The judge's recommended decision found that the Respondent violated Section 8(a)(1) of the Act as alleged, sustained the Union's challenges to two of the ballots, and overruled the Union's challenges to three of the ballots. He further recommended that the election be set aside based on the Union's objections if the Union does not prevail on the final vote tally. For the reasons discussed below, we agree with the Respondent that the judge erred in sustaining the Union's challenge to employee Erin Spetnagel's ballot because he found her to be an excluded office clerical employee.

II. RELEVANT FACTS

The Respondent maintains a facility at which it refills patient prescriptions for Kroger pharmacies throughout Ohio. Located within the facility are a production area, an office for Respondent's facility manager, Griffin, an office for the pharmacists, and a Failed Claims Office. The Failed Claims Office is walled off from the production floor, but the door to the office always remains open. The door is only a few feet from the production line. All facility employees, except Griffin and the pharmacists, have the title of pharmacy technician. Griffin supervises all employees, although there is also a supervisory shift coordinator who supervises the production line during the second shift. Employees within the Failed Claims Office resolve problems with refill requests resulting from potential problems with drug interactions, incorrect insurance information, or premature refill requests. The employees within the Failed Claims Office work at desks, and employees on the production floor stand at various stations of the production line ensuring that refills are properly filled.

The employee whose eligibility is at issue in this case, Spetnagel, works in the Failed Claims Office with employees Clary, Harris, and Spencer.⁴ Spetnagel is primarily responsible for answering the Respondent's five telephones so that the other employees can work more on

³ The complaint alleged that Griffin coercively interrogated an employee and threatened employees with a stricter administration of discipline if employees elected a Union, in violation of Sec. 8(a)(1) of the Act.

⁴ Clary and Spencer work on the first shift with Spetnagel. Harris works on the second shift. Clary and Harris process failed claims. Spencer acts as an inventory clerk.

failed claims. However, the other employees within the Failed Claims Office also answer the telephones if Spetnagel is busy. All of the facility's telephone calls come into the Failed Claims Office. The record reveals that at least some (and perhaps most) of the telephone calls are from the Respondent's area pharmacies calling with questions about or problems concerning prescriptions. The record does not reflect who, other than pharmacies, calls the facility or what percentage of the calls come in from others.⁵ The Respondent receives hundreds of calls a day, but there is no evidence regarding how much time is involved in handling each call or how much time other employees within the Failed Claims Office spend answering the telephones if Spetnagel is unable. Further, there is no credited testimony regarding what is done with the calls once they are answered.

In addition to answering the telephones, Spetnagel spends 20–30 minutes on the production floor each day delivering pink slips (notices that a prescription cannot be refilled). Spetnagel puts the pink slips in delivery bags before the noon shipment to the Respondent's area pharmacies. Spetnagel is in the Failed Claims Office the rest of the day. With respect to the other failed claims employees, the judge found that Clary's primary responsibility is processing failed claims but that, in addition, she spends at least 45 minutes on the production floor assisting production employees before the noon shipment and also performs such tasks as replenishing the bottling machine and fixing the machine that prints prescription labels. The judge found that Harris performs Clary's job on the second shift and also performs Spetnagel's duty of delivering pink slips during the second shift. Finally, with respect to Spencer, the judge found that she acts as a supply clerk by ordering drugs from suppliers and making sure that drugs are on supply shelves. She also assists production employees by bringing in shipments of supplies to the production area. The judge made no findings about the amount of time spent by Harris or Spencer on the production floor.

III. THE JUDGE'S FINDINGS CONCERNING SPETNAGEL'S CHALLENGED BALLOT

The judge found that, unlike the other employees in the Failed Claims Office, Spetnagel is an office clerical employee and thus excluded from the bargaining unit. In concluding that Spetnagel is an office clerical, the judge found that Spetnagel's duties are only tangentially related to production because she spends virtually all her

time answering the telephone and goes out to the production floor only to deliver pink slips. The judge also noted that no employee performs Spetnagel's duties during the second shift even though there is full production.⁶

The judge found that unlike Spetnagel, Clary, Harris, and Spencer are plant clericals, and thus part of the bargaining unit, because the tasks they perform are allied to the production process. Specifically, they resolve problems so that failed claims can proceed to the production line. Further, the judge found that they perform production work daily, particularly before the noon and mid-night shipments to the area pharmacies.

IV. CONTENTIONS OF THE EXCEPTING PARTY

The Respondent excepts only with respect to the judge's finding that Spetnagel, in contrast to the other employees working in the Failed Claims Office, is an office clerical. The Respondent contends that, contrary to the judge's finding, the record evidence shows that Spetnagel's duties are materially the same as the duties of the other failed claims employees who were found, without exception, to be part of the bargaining unit. Further, the Respondent contends that even if Spetnagel does spend most of her time answering the telephones, unlike the other employees in the Failed Claims Office, answering the telephones is integral to production. Therefore, the Respondent asserts that Spetnagel should be included in the bargaining unit as a plant clerical like Clary, Harris, and Spencer.

V. THE EVIDENCE DOES NOT ESTABLISH THAT SPETNAGEL SHOULD BE EXCLUDED FROM THE BARGAINING UNIT

The Union bears the burden of establishing that Spetnagel should be excluded from the bargaining unit as an office clerical. See, e.g., *Queen Kapiolani Hotel*, 316 NLRB 655, 664–665 (1995) (party seeking to exclude an individual from voting for a collective-bargaining representative has burden of establishing that individual is ineligible to vote).⁷ On balance, we conclude, contrary to the judge and our dissenting colleague, that the Union did not meet its burden of establishing that Spetnagel's principal duties are so removed from the production

⁶ The judge apparently was referring to Spetnagel's telephone answering duties because he found, as discussed above, that Harris performs Spetnagel's duty of delivering pink slips during the second shift.

⁷ Our colleague adopts the Union's argument that it is reasonable that at a facility such as the one in question, an office clerical employee would be responsible for handling the Respondent's five or six phones. However, the party asserting the ineligibility of a voter bears the burden of proving ineligible status and what may be reasonable is not a substitute for proof.

⁵ Levitt, a pharmacy technician on the first shift, testified that she thinks Spetnagel's duties include answering personal calls for Griffin, but she later admitted that she does not know which calls are from Kroger pharmacies and which are from other people.

process that she should be excluded from the bargaining unit because she is not a plant clerical.⁸

The Board has recently reiterated that the distinction between “plant clericals” and “office clericals” is “rooted in community-of-interest concepts, . . . albeit it is occasionally difficult to discern.” *Caesar’s Tahoe*, 337 NLRB 1096, 1098 (2002). With respect to plant clericals, the “test generally is whether the employees’ principal functions and duties relate to the production process, as distinguished from general office operations.” Id. “[T]he fact that clerical employees exercise some secretarial skills is no obstacle to finding them to be plant clericals, if other factors link them to the production process and other production employees.” Id. at 1099.

The evidence presented does not establish that Spetnagel’s duties while in the Failed Claims Office are so dissimilar from the duties of the other failed claims employees that she, unlike them, should be excluded from the bargaining unit. The judge found that the Respondent receives hundreds of calls a day and that Spetnagel spends most of her time answering the telephones. However, the record reveals that although Spetnagel answers the telephones more frequently, the other failed claims employees answer the telephones when Spetnagel is occupied. The Union presented no evidence demonstrating how much time Spetnagel spends answering the telephones relative to the other failed claims employees.

Further, the Union failed to prove that Spetnagel’s duty of answering the telephones is not integral to the production process. On the contrary, the record evidence reflects that at least some (and perhaps most) of the calls the Respondent receives are from area pharmacies calling the Respondent’s refill center with questions about or problems concerning prescriptions. These calls either relate to failed claims work or to the refill process and are therefore integral to production. See *Avon Products, Inc.*, 250 NLRB 1479, 1483–1484 (1980) (finding clericals who answer telephones to be plant clericals).⁹

⁸ We note that the Union did not call Spetnagel to testify.

⁹ Our dissenting colleague notes that the Respondent’s witness Griffin did not testify that answering phones is integral to production. However, it was not incumbent upon Griffin to provide this testimony; rather it was incumbent upon the Union, the party bearing the burden of proof, to establish that answering phones was not integral to production. The Union failed to do so, and, in fact, failed to adduce any evidence regarding the substance of the calls or how they were unrelated to the processing of failed claims. The Union concedes that Spetnagel answers phones and delivers pink slips. The Union failed to establish that these functions are not integral to the production process. The Union also failed to establish that Spetnagel performs other duties that are unrelated to the production process.

Our dissenting colleague cites *Palagonia Bakery Co.*, 339 NLRB No. 74, slip op. at 22 (2003), for the proposition that “clericals whose principal functions and duties relate to the general office operations and

The Union also failed to prove that Spetnagel’s duties on the production floor are less integral to production than the duties of the other failed claims employees. Specifically, the Union did not prove that delivering pink slips is less integral to production than refilling the bottling machine. In fact, Harris, who was found to be a plant clerical by the judge, performs the same duty of delivering pink slips during the second shift that Spetnagel performs during the first shift. Our dissenting colleague attempts to distinguish Spetnagel’s duties while on the production floor from “actual” production or “production support tasks.” However, the pink slips relate directly to the prescriptions, are placed into bags on the production floor, and are delivered to pharmacies along with the refills. We discern no basis for distinguishing these activities from “actual” production.

Finally, the Union did not prove that Spetnagel spends significantly less time on the production floor than the other failed claims employees, all of whom the Union agrees are plant clericals. See *Dunham’s Athleisure Corp.*, 311 NLRB 175, 176 (1993) (distinguishing between office and plant clericals by the amount of interaction the employees had with production employees). The judge found that Spetnagel spends approximately 20–30 minutes on the production floor compared to about 45 minutes spent by employee Clary. We find this difference to be insignificant, particularly in light of the other similarities between Spetnagel’s duties and those of the other employees found to be plant clericals.

The party seeking to exclude an employee from the bargaining unit and participation in a Board election bears the burden of establishing ineligibility. In this case, the record as a whole does not support the judge’s conclusion that Spetnagel should be excluded from the bargaining unit as an office clerical. In deciding the eligibility of Spetnagel, we note particularly that she works in the Failed Claims Office, and all of the other employees in that office are in the unit. Although Spetnagel’s time on the production floor is limited (20–30 minutes per day) by the time she spends in the Failed Claims Of-

are performed within the office itself are office clericals who do not have a close community-of-interest with a production unit.” In *Palagonia*, however, the Board noted that taking orders over the phone and distributing orders to the production department *could* be part of the production process. The employee in *Palagonia* was found to be an office clerical rather than a plant clerical because, although she took orders by phone, she had no contact with production employees. Id. Here, by contrast, Spetnagel works directly with other undisputed plant clericals who also answer telephones, takes calls from pharmacies relating to production refill requests, and interacts with production employees while delivering pink slips to the production floor where she inserts them into bags on the production line. Cf. *Hamilton Halter Co.*, 270 NLRB 331 (1984) (processing customer orders is a task closely related to tasks performed by plant clericals).

fice, the same can be said of the others. Concededly, Spetnagel's work in the Failed Claims Office consists primarily of answering phones, and the others primarily perform other functions in that office. However, the answering of phones is itself tied to the production process. Further, Spetnagel works closely with the others in that office, all of whom are in the unit. Thus, the fact that Spetnagel's duties consist largely of phone answering is not sufficient to exclude her while including the other three. We therefore reverse the judge on this issue and find that Spetnagel is a plant clerical, part of the bargaining unit, and eligible to vote in the representation election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below.

IT IS ORDERED that the Respondent, The Kroger Company, Groveport, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the Union's objections to conduct affecting the results of the election conducted in Case 9-RC-17712 are sustained.

IT IS FURTHER ORDERED that the challenges to the ballots of Estella Clary, Michelle Spencer, Kimberly Harris, and Erin Spetnagel in Case 9-RC-17712 are overruled.

IT IS FURTHER ORDERED that the challenge to the ballot of Theresa Streich is sustained.

IT IS FURTHER ORDERED that Case 9-RC-17712 is severed from Case 9-CA-39712 and remanded to the Regional Director for Region 9 for action consistent with the Direction below.

DIRECTION

It is directed that the Regional Director for Region 9 shall, within 14 days of this Decision, Order, and Direction, open and count the ballots of Estella Clary, Michelle Spencer, Kimberly Harris, and Erin Spetnagel and thereafter prepare and serve on the parties a revised tally of ballots. If the revised tally shows the Union has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Union has not received a majority of the votes cast, the election shall be set aside and a rerun election shall be conducted.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista,

Chairman

Peter C. Schaumber,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

My colleagues find, contrary to the judge, that the challenge to the ballot of Erin Spetnagel should be overruled because she is a plant clerical. I find, in agreement with the judge's analysis and conclusion, that the challenge to Spetnagel's ballot should be sustained because she is an office clerical, expressly excluded from the bargaining unit.

I. BACKGROUND

The Union challenged the ballots of Estella Clary, Kimberly Harris, Michelle Spencer, and Erin Spetnagel on the grounds that they are office clericals, expressly excluded from the stipulated bargaining unit. The judge found that Clary, Harris, and Spencer are plant clericals, and there are no exceptions to those findings. The judge found, on the other hand, that Spetnagel is an office clerical. He found that her duties are only tangentially related to those of the production employees, are quite different from those of plant clericals Clary and Harris, and are completely dissimilar to those of plant clerical Spencer.

In finding, contrary to the judge, that Spetnagel is a plant clerical, my colleagues find that the evidence does not establish that her duties are so dissimilar from those of Clary, Harris, and Spencer, and that Spetnagel should be excluded from the bargaining unit as an office clerical while they are included as plant clericals. I disagree.

II. FACTS

Clary, Harris, Spencer, and Spetnagel all work at desks in the Failed Claims Office. Prescriptions that cannot be filled automatically because of informational, administrative, medical, or insurance problems are routed as part of the production process to the Failed Claims Office for resolution and processing. Clary, Spencer, and Spetnagel work on the first shift, Harris on the second.

Clary's primary duty is to resolve and process the failed claims on the first shift. Harris does the same thing on the second shift. Spencer's primary duty is to manage the Respondent's inventory of drugs and supplies.¹

The judge correctly found, on the other hand, that Spetnagel's duties are "quite different" from those of

¹ Spencer orders drugs and office and production supplies from suppliers, retrieves drugs from inventory, updates inventory records, replenishes inventory, and carries arriving shipments of drugs on skids from the warehouse to the production area.

Clary and Harris, and that there is no similarity at all between the duties of Spetnagel and Spencer. Spetnagel's primary duty is to answer the Respondent's five telephones. The Respondent receives hundreds of phone calls each day, and Spetnagel answers most of them. She does nothing but answer the phones for virtually her entire workshift. The only time that anyone else answers a phone is when Spetnagel is unable to, usually because she is already on another call. In testimony implicitly credited by the judge, Plant Manager Mike Griffin testified that he made Spetnagel primarily responsible for answering the phones so that Clary could work all of the time on resolving and processing failed claims as a step in the production process. According to Griffin, "I want [a] person to be working on failed claims all the time as a [p]roduction station. I want to keep that rolling. Keeps it most efficient if [failed claim processors] are uninterrupted by the phone." The only time that Spetnagel leaves her phones and emerges from the Failed Claims Office is for a 20–30 minute period each day, solely to include unresolved failed claim notification-explanation slips (pink slips) with shipments of filled drug orders being sent to individual retail stores.

Clary, Harris, and Spencer also perform a variety of production and production support tasks that Spetnagel does not. Indeed, Spetnagel spends virtually all of her time answering the phones so that Clary can spend almost all of *her* time either actually processing the failed claims or working in the production area. Clary spends about 20 percent of each workday working on the production floor, interacting with the pharmacy technicians and helping them with problems. Thus, in addition to actually resolving and processing failed claims in the Failed Claims Office, Clary sets up the production line at the start of the shift, replenishes the bottling, label printing, and the pill counting machines, and clears jams on the production line. Spencer also performs these production support tasks. And Clary and Spencer also perform actual production work for about 45 minutes each day, packing products for shipment just prior to the dispatch of the Respondent's noon shipments to individual retail stores. Harris performs the same failed claims processing tasks and similar production support tasks on the second shift that Clary performs on the first shift.

Employees Tina Levitt and Sandra Moore, on the other hand, credibly testified that the only time that Spetnagel comes out of the Failed Claims Office onto the production floor is to put pink slips into outgoing shipments during the 20–30 minute period prior to the noon shipment each day.

III. APPLICABLE PRINCIPLES

Recently, in *Palagonia Bakery Co.*, 339 NLRB No. 74 (2003), the Board reiterated that the distinction between office clericals and plant clericals is rooted in community-of-interest principles. The Board stated that clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. *Id.*, JD slip op. at 22. A key element in determining whether a community of interest exists is whether the asserted plant clericals perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.² The crucial element in finding such an alliance with the production process is significant contact with production employees. In cases where employees are found to be plant clericals, the Board consistently relies upon the presence of significant direct contact with production employees in finding functional integration with the production process and a sufficient community of interest. *Id.* On the other hand, where the Board finds employees not to be plant clericals, it consistently relies heavily on the absence of evidence of substantial contact with production employees to conclude that the asserted plant clericals do not share a community of interest with production employees and are office clerical employees. *Id.*

IV. APPLICATION OF PRINCIPLES

In agreement with the judge's analysis and result, I find that Spetnagel is an office clerical. Her principal function and duty—answering the phones virtually all day—relates to the Respondent's general office operations and is performed within the office itself. She has no significant direct contact with the production employees, coming into contact with them for only about 20–30 minutes each day solely to place pink slips in the outgoing drug shipments. Neither her answering of the phones nor her pink slip task is closely allied to the production process. And beyond the lack of substantial connection between Spetnagel's duties and the *production* process, Spetnagel's telephone answering and pink slip placement tasks are substantially or totally dissimilar to the *failed claims* processing tasks performed by plant clericals Clary and Harris, the *inventory control* tasks performed

² I will be applying this "production process" framework in this case with caution, however, because I believe in general that it can be extended too far, as my colleagues have extended it in this case, to encompass employees like Spetnagel whose duties are only tangentially related to a "production process." Thus, I agree with the judge's cautionary remark here that "[o]f course, the work of any clerical employee in any production facility assists production employees in some regard."

by plant clerical Spencer, and the *production support* tasks performed by all three of them. Accordingly, I find that Spetnagel does not share a community of interest with either the production employees or the plant clerical employees, and that she is an office clerical.

In reversing the judge's analysis and conclusion that Spetnagel is an office clerical, and instead finding that she is a plant clerical, my colleagues find that the Union failed to prove that Spetnagel's answering the phones is not integral to production. Plant Manager Griffin testified extensively about the production process as well as the processing of failed claims, and he did not testify that answering the phones played any part in the production process. Rather, he testified in effect that answering the phones was actually *separate* from the failed claim process. Thus, he assigned Spetnagel primarily to answer the phones in order to keep Clary free to process failed claims without interruption.³

My colleagues also find that the Union failed to prove that Spetnagel's task while on the production floor, placing unresolved failed claim notification-explanation pink slips with shipments of filled drug orders, is less integral to production than the duties of Clary, Harris, and Spencer. But the record establishes that Clary and Spencer perform some *actual* production tasks while on the production floor, and that they and Harris also engage in substantial production *support* tasks while on the production floor. Spetnagel, on the other hand, does not perform *any* production or production support tasks.

My colleagues also find that the Union failed to prove that Spetnagel spends significantly less time on the production floor than Clary, Harris, and Spencer. But, in addition to the actual production tasks engaged in by Clary and Spencer, the two of them and Harris perform numerous production support tasks on the production floor during the workday. Clary testified that from 7 to 11:15 a.m. each day she is "up and down all the time doing other things" like replenishing the bottling machine, changing labels and ribbons on the labeling ma-

chine, clearing production line jams, and helping production employees with problems. Clary further testified that she is out on the production floor even more in the afternoon, locating drugs that have been specially requested by particular stores. In sum, Clary testified that "I help a lot out on the floor and it's a very busy place"; "I spend a lot of time on the floor . . . helping them with different problems." Spencer testified that she performs the same type of production support tasks that Clary does, that she typically works with production employees in putting inventory away, and that "quite a bit of [her time] is out on the floor." Spetnagel, on the other hand, emerges from the Failed Claims Office for only 20–30 minutes each day, to place pink slips with outgoing shipments.

The Union summarizes its arguments in response to the Respondent's exception to the judge's finding that Spetnagel is an office clerical this way:

In answering the telephones in the office nearly all day, and nearly 100% of the time, Erin Spetnagel was performing a function completely different from the plant clerical employees and the production employees. It is reasonable that a pharmacy that employs several pharmacists and two supervisors, in addition to about 30 employees, that serves pharmacies in 164 stores, and that processes 5500 orders per day, has one office clerical employee handling 5 or 6 phones in the office as her primary responsibility.

In light of all of the record evidence discussed above and by my colleagues, I find that the judge correctly determined based on the preponderance of the relevant evidence that Spetnagel is an office clerical.

Dated, Washington, D.C. June 30, 2004

Dennis P. Walsh,

Member

NATIONAL LABOR RELATIONS BOARD

Eric J. Gill, Esq., for the General Counsel.

Michael J. Underwood and Franck Wobst, Esqs. (Porter, Wright, Morris & Arthur), of Columbus, Ohio, for the Respondent.

Leonard S. Sigall and Steven D. Stone, Esqs., of Reynoldsburg, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Columbus, Ohio, on March 6 and 7, 2003. At issue are an unfair labor practice charge filed by the Union, the

³ Thus, my colleagues are incorrect in stating that the Union failed to establish that Spetnagel's phone answering was not integral to production and not related to the processing of failed claims. The record establishes both facts. Specifically, Plant Manager Griffin testified that he made Spetnagel primarily responsible for answering the phones so that failed claims plant clerical Clary would be able to spend all of *her* time resolving and processing failed claims, as a step in the production process. In short, Spetnagel answered the phones so that *Clary* would not have to and could do failed claims production work instead.

In nevertheless finding that Spetnagel's phone answering is *also*, like Clary's, integral to production, my colleagues are extending the "production process" framework for analysis too far and are inadvertently showing the wisdom of the judge's cautionary remark quoted in fn. 2, *supra*: "[O]f course, the work of any clerical employee in any production facility assists production employees in some regard."

United Food and Commercial Workers (UFCW) Local 1059, the Union's objections to a representation election conducted at the Kroger Refill Center in suburban Columbus, on October 31, 2002, and the Union's challenges to the ballots of five individuals who attempted to vote in that election.

The charge was filed October 28, 2002, and the complaint was issued January 17, 2003. In the unfair labor practice case, the General Counsel alleges that Respondent, the Kroger Company, by its facility manager, Michael Griffin, violated Section 8(a)(1) of the Act by threatening and/or interrogating three employees on separate occasions during an election campaign. On February 18, 2003, the unfair labor practice case was consolidated for hearing with the Union's challenge to five ballots and its objections to the October 31, 2002 election. These objections are identical to the alleged 8(a)(1) violations.

Fourteen of the employees whose ballots were counted voted in favor of the Union and 10 voted against being represented by Local 1059. The Union challenged the ballots of Michelle Spencer, Estella Clary, Kimberly Harris, Erin Spetnagel, and Theresa Streich. If four of the challenges are rejected, these ballots could determine the outcome of the election. The Union contends that Spencer, Clary, Harris, and Spetnagel are "office clerical employees" excluded from the bargaining unit by the stipulated election agreement.¹ The Union contends that Streich is ineligible to vote because she is a supervisor within the meaning of Section 2(11) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, The Kroger Company, maintains a facility in Groveport, Ohio, a suburb of Columbus, from which it refills patient prescriptions for Kroger retail pharmacies throughout the State of Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, UFCW Local 1059, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE CHALLENGED BALLOTS

On September 27, 2002, the Union filed a petition to represent all regular full-time and part-time employees at the Kroger Refill Center in Groveport. The Regional Director approved a stipulated election agreement on October 7, for the following bargaining unit:

All regular full-time and part-time employees employed by the Employer at its Kroger Refill Center, 2250 Spiegel Drive, Groveport, Ohio facility, but excluding all managers, office

clerical employees, pharmacists, pharmacist-interns, and all guards and supervisors as defined in the Act.

A. *The Employees in the Failed Claims Office*

Respondent's facility is essentially a large open area in which employees stand around an 80-foot oval-shaped conveyor filling prescriptions. Since June 2002, the facility has run two shifts; the first from 7:30–3:30 p.m. Monday–Friday and the second Monday–Thursday, and Sunday from 3:30 p.m. to midnight. Theresa Streich is the second shift coordinator and is responsible for overseeing production work during that shift. Respondent has three daily shipping times, 9 a.m., noon, and midnight. The pace of work just prior to the noon and midnight shipments is "hectic."

There are several offices on the periphery of the conveyor, including that of Griffin, the facility manager, and the "Failed Claims Office." Spencer, Clary, Harris, and Spetnagel work at desks inside the Failed Claims Office. The door to this office, which is only a few feet from the production line, is always kept open. All five of the employees whose ballots were challenged park in the same parking lot as production employees and they use the same breakroom. All the employees working on the conveyor line and those working in the Failed Claims Office have the title "pharmacy technician." There are three levels of pharmacy technicians in the facility and all five of the individuals whose ballots were challenged are level 3 technicians, the highest level. A few technicians who work exclusively on the conveyor line are also level 3 pharmacy technicians.

1. Estella Clary

Clary works on the first shift and her primary responsibility is the processing of "failed claims." These are prescriptions that cannot be filled initially due to problems such as an incorrect patient social security numbers, drug interaction concerns, insurance problems or being ordered for refill too soon. Clary spends most of her workday making computer entries at her desk to resolve these problems so that the prescriptions can be filled.

However, Clary also spends some of her time on the production floor and did so in October 2002. She replenishes a bottling machine with empty prescription bottles and fixes a machine that prints prescription labels. On a daily basis, between 11:15 and noon, Clary leaves her office and assists production employees in preparing for the noon shipment. She may also work on the production floor just prior to leaving work at 3:30 p.m.

2. Kimberly Harris

Harris performs Clary's job on the second shift. She generates reports on "failed claims" and makes data entries on the computer to enable many of flawed prescriptions to be filled. Harris comes out on the production floor to put slips into the bags for each retail store for those prescriptions that cannot be filled. Harris did not testify in this proceeding and there is very little reliable evidence as to what other tasks Harris performed during October 2002.

¹ The Union also alleged that Spetnagel should be excluded from the bargaining unit on the grounds that she is in effect Facility Manager Griffin's personal secretary and therefore a confidential employee. The Union appears to have abandoned this argument in its brief and in any event has failed to prove this allegation.

3. Erin Spetnagel

Spetnagel works on the first shift and her primary responsibility is to answer the phones. She does this almost her entire workshift except for a period of 20–30 minutes just prior to the noon shipment. At this time, Spetnagel comes out of the office and assists in putting the “pink slips” into shipments to the retail stores.² These slips explain why certain prescriptions cannot be filled. There is no credible evidence that Spetnagel did any other production work in October 2002.³

4. Michelle Spencer

Spencer is Respondent’s inventory clerk. She works 8 a.m. to 4:30 p.m. Monday–Friday and 3:30–midnight on Sunday.⁴ Spencer orders drugs from Kroger’s supplier and orders supplies, which enable the production employees to perform their

² I credit the testimony of Tina Levitt and Sandra Moore that Spetnagel only comes out on the production floor to put the pink slips with the shipments to the individual stores.

³ Spetnagel did not testify. I decline to credit Mike Griffin’s testimony as to Spetnagel’s duties, because, for one thing, his testimony regarding the amount of time Spetnagel spends answering telephone calls was inconsistent.

On cross examination by the Union’s counsel, Griffin testified:

Q. All right. Let’s talk some more about Erin. Erin is assigned to take all the phone calls, right?

A. Yes, she’s the first person to answer the phone.

Q. You have hundreds of phone calls a day, don’t you?

A. Yes.

Q. Literally, hundreds of phone calls a day and you said she answers the phone because you wanted the other ones working full-time on failed claims, isn’t that correct?

A. Which, in turn, is actual production.

Q. . . . But, your testimony was that you wanted Erin handling the phones full-time so that the others in the office could work full time on failed claims, right? That was your testimony?

A. Yes.

Tr. 179–180.

When led by Respondent’s counsel on redirect examination, he said something quite different:

Q. What is Erin Spetnagel’s primary duty, is it Failed Claims?

A. Yes, that’s her primary duty.

Q. She doesn’t spend more time on the phone than she does on failed claims, does she?

A. I would say not.

Q. She’s not on the phone all day, is she?

A. No.

Tr. 211–212.

His testimony generally indicates a desire to lump Spetnagel’s duties with those of the other employees in the failed claims office when in fact her duties were quite different. Finally, Griffin’s testimony is ambiguous at times as to whether he is describing Spetnagel’s duties in October 2002, which are relevant to this case, or her duties after the election. All employees in the failed claims office began spending more time on the production floor after the election. To the extent that Norma Hickman’s testimony stands for the proposition that Spetnagel performs tasks other than distributing pink slips on the production floor, it is unclear if Hickman is testifying about October 2002 or afterwards.

⁴ Spencer is not scheduled to work Fridays, but normally does so.

tasks. She regularly leaves the Failed Claims Office to look for drugs on shelves near the conveyor line. Spencer often assists production employees in bringing shipments from Kroger’s drug supplier from the warehouse into Respondent’s production area. For at least 15 minutes a day, Spencer helps conveyor line employees pack drugs just before the noon shipment.

5. Theresa Streich

Streich is a level 3 pharmacy technician. In June 2002, when Respondent instituted a second shift, it created a position titled “second shift coordinator.” Streich was given that position and is paid an extra \$1.50 per hour as a result. As second shift coordinator, Streich is the person primarily responsible for production operations on the second shift. Streich works from 3:30 p.m. to midnight and is essentially in charge after Facility Manager Griffin leaves the facility between 3:30 and 5:30 p.m. While there is a pharmacist on duty on the second shift, this pharmacist rarely, if ever, gets involved with the direction of employees on the conveyor line.

Streich draws up work schedules, moves employees from one station to another as needed, adjusts timecards and approves any variations from a production employees’ normal breaktime. When scheduling employees at a particular workstation, Streich considers their relative skill levels (Tr. 159). She submits her work schedules to Griffin for review. Facility Manager Griffin told second shift employees that when Streich tells them to do something, it is as if Griffin himself were speaking.

When a pharmacy technician seeks to move from level 1 to level 2, they must pass a practical examination. Streich is the person who observes the individual and decides whether they can perform the tasks that entitle them to a promotion. She also determines whether they are sufficiently “hard working” to merit such a promotion.

Streich also screens and interviews job applicants for positions on the second shift. She evaluates the applicant’s work history and qualifications. Streich determines whether to interview applicants and whether to recommend them to Griffin or Paula Race in Kroger’s human resources department for a position. If Streich determines an applicant should not be interviewed, they are effectively excluded from Respondent’s hiring process. Employees that are interviewed by Streich and recommended for hire are not interviewed again by Griffin, Race, or anyone else.

III. ANALYSIS

A. The “Failed Claims Office” Employees

In *Caesar’s Tahoe*, 337 NLRB No. 170 (2002) (not reported in Board volumes), the Board adopted the test enunciated in *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999). This a three-prong analysis for resolving determinative challenged ballots in cases involving stipulated bargaining units.⁵ The Board first determines whether the stipulation is

⁵ *Scholastic Magazines*, 192 NLRB 461 (1971), and *Avon Products*, 250 NLRB 1479 (1980), relied upon by Respondent at pp. 14–15 of its brief, have limited relevance to the instant case. Those cases did not involve stipulated election agreements. In the instant case, the parties

ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

In the instant case, the stipulation is unambiguous insofar as it excludes "office clerical employees" from the bargaining unit. It is ambiguous as to whether the "failed claims" employees fall within that category. The only extrinsic evidence of the parties' intent is the fact that if all four "failed claims" employees fall outside of the "office clerical" category, the stipulation excludes none of the employees at the Kroger Refill Center as "office clericals." One would think that a classification of employees that does not exist at the refill center would not be explicitly excluded from the bargaining unit.

Respondent points out that there are not any guards employed by the refill center, although one works at the Kroger warehouse next door.⁶ Guards are also explicitly excluded from the bargaining unit. The Union, however, distinguishes the exclusion of guards from the exclusion of office clericals by the fact that Section 9(b)(3) of the Act prevents the Board from certifying a bargaining unit which includes guards and nonguards. Thus, it suggests that while the exclusion of guards in the description of the bargaining unit is superfluous, the exclusion of office clericals must be accorded some meaning by the exclusion of some employees at the refill center from the bargaining unit.

In a somewhat analogous context, the Board in *Kalustyans*, 332 NLRB 843 (2000), rejected a Union's challenge to the ballots of three employees. In that case, the union argued that the three were office clerical employees, who were excluded by the stipulated election agreement rather than shipping clerks, who were included. In deciding that the parties' intent was to include the three in the unit, the Board relied, at least in part, on the fact that if the three employees were not shipping clerks, there would be no shipping clerks in the bargaining unit. However, I do not discern in *Kalustyans* a holding that the exclusion of a category of employees in a stipulated election agreement is evidence of the parties' intent to exclude at least one employee from the bargaining unit, as being a member of that category.

With regard to the third prong of the Board's test, community-of-interest concepts, the Board has long drawn a distinction between "plant clericals" and "office clericals." "The indispensable and conclusive element is that the asserted plant clericals 'perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.'" *Caesar's Tahoe*, supra at p. 3, quoting *Fisher Controls Co.*, 192 NLRB 514 (1971).

agreed that "office clericals" were to be excluded from the bargaining unit. Thus, the issue herein, whether any employee at the refill center is an "office clerical," is somewhat different than the issues confronted by Board in *Scholastic Magazine* and *Avon Products*.

⁶ This guard patrols a parking lot used by refill center employees. Additionally, Griffin called this guard when something was stolen from the refill center.

Applying this standard to the tasks performed by Clary on the first shift and Harris on the second, I conclude that these two employees are clearly "plant clericals." The clerical tasks they perform are allied to the production process in that their efforts enable the "failed claims" to proceed to the production line. Clary also performs production work on a daily basis—particularly in the 45 minutes prior to the noon shipment.⁷

The tasks of Spencer, the inventory clerk, and Spetnagel are less closely allied to the filling of prescriptions. Yet, Spencer is the employee who makes certain that the medications and supplies necessary to fill the prescriptions are available in the refill center. Spetnagel, on the other hand, is the clerical employee who spends the most time within the walls of the office, acting essentially as a receptionist, and interacts least with the production employees.

In *Hamilton Halter Co.*, 270 NLRB 331 (1984), the Board recognized that the "distinction drawn between office clericals and plant clericals is not always clear." In that case the Board found two employees to be "plant clericals" because their primary function, the transcription of sales order forms to facilitate production was a function closely associated with production. The Board also found it significant in this regard that the two maintained inventories, ordered supplies, and assisted shop employees in loading and unloading trucks. By analogy to the reasoning in *Hamilton Halter*, Spencer is a "plant clerical."

Resolving the status of Spetnagel is more difficult since the Board precedent appears to be less clear. In *Dunham's Athletic Corp.*, 311 NLRB 175, 176 (1993), the Board found that two employees to be "office clericals" despite the fact that they "sporadically" performed work in the warehouse. It found that the limited contact that these two had with bargaining unit employees distinguished their situation from other cases in which the Board held that employees were "plant clericals."

Similarly, the Board in *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994), found that two manufacturing data entry operators were "office clericals" and thus excluded them from a production unit.

Clericals, whose principal functions and duties relate to the general office itself, are office clericals, who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.

Id. at 1108.

In *Cook Composites*, the Board distinguished *Hamilton Halter Co.*, supra, on the grounds that the clerical employees in *Hamilton* performed a significant degree of production work. It also relied on the fact that *Cook Composites* ran a full production shift at night and had no manufacturing data operators assigned to that shift. Similarly, in the instant case, there appears to be no employee whose performs Spetnagel's tasks on the second shift.

⁷ Harris did not testify; however, I assume that she helps out in the production area just prior to the midnight shipment. I make this assumption because the record indicates that Harris has to complete the "failed claims report" by 10 p.m.

There are, however, many factors in *Cook Composites* that distinguish the manufacturing data entry operators, found to be “office clericals,” from Spetnagel. They were located in a different building from the production employees, although they went to the production area several times a day. The *Cook Composite* clericals used a different parking lot from other unit employees, did not frequent the same lunchroom, did not wear the production employees’ uniform, and did not punch a time-clock. Finally, Facility Manager Griffin, who also supervises the production employees on the first shift, supervises Spetnagel. The data entry operators in *Cook Composites* had a different supervisor than the employees in the production unit.

In *Cook Composites*, the Board relied upon *Container Research Corp.*, 188 NLRB 586, 587 (1971), in which the Board found a cost coordinator and a materials coordinator to be “office clericals.” In that case, the Board found that the employees had only “incidental contact” with production and maintenance employees and appears to draw the distinction between office clericals and plant clericals on the basis of an employee’s “principal functions and duties.” In *Container Research*, the Board found the cost coordinator to be an office clerical despite the fact that she spent 25 percent of her time in the production area and had daily contact with production and maintenance personnel.

In *Brown & Root*, 314 NLRB 19 (1994), the Board found three document control clerks to be “plant clericals” in part because they had daily contact with unit employees and because their primary function is directly related to construction work and these duties provide daily assistance to unit employees. Of course, the work of any clerical employee in any production facility assists production employees in some regard. It appears that the issue in these cases is how directly related are a clerical employee’s tasks to those of bargaining unit employees. I conclude that Spetnagel’s duties are only tangentially related and that she is therefore an “office clerical” ineligible to vote.⁸ Spetnagel spends virtually all her time answering the phone in the office and goes out on the production floor only to put slips into the shipments explaining to the retail pharmacies why certain prescriptions did not go through the production process.⁹

B. Is Theresa Streich a Supervisor Within the Meaning of the Act?

Section 2(11) of the Act, defines “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to

recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

Pursuant to Section 2(3) of the Act, a “supervisor,” as defined in Section 2(11), is not an employee whose rights to engage in union or protected concerted activity are protected by the Act. A party seeking to exclude an individual from the category of an “employee” has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Section 2(11) establishes that an individual is a supervisor. However, not all decisionmaking constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. The fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience, *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), *enfd.* 257 F.2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority on an irregular and sporadic basis is not sufficient to establish supervisory status, *Browne of Houston*, 280 NLRB 1222, 1225 (1986).

Streich’s supervision of the production line on the second shift does not necessarily make her a statutory supervisor. There are numerous cases in which an employee in charge of the employer’s work force at a specific location has not been deemed to be a supervisor due to the routine nature of the employee’s oversight functions, e.g., *Azusa Ranch Market*, 321 NLRB 811 (1996). On the other hand, Streich’s authority to interview and to recommend whether or not to hire job applicants establishes her supervisory status. There is also a close question of whether she is a “supervisor” by virtue of her authority to schedule employees at specific workstations. The issue before me is whether Streich uses “independent judgment” in effectively recommending whether or not to hire job applicants and/or in effectively recommending the assignment of employees to their workstations.

Streich testified that in deciding whether to interview an applicant:

A. . . . I get the most qualified first and then I go back to the other ones.

Q. Okay. Is there a set of guidelines or is there something in writing that you follow in writing that you follow in making these decisions on whether or not you’re going to interview these people or do you use your judgment based on your past experience?

A. I use my judgment.

Tr. 282–283.

The Board defines the power to effectively recommend as meaning “that the recommended action is taken with *no* independent investigation by superiors,” *ITT Corp.*, 265 NLRB 1480, 1481 (1982), *Wesco Electrical Co.*, 232 NLRB 479 (1982). Applicants interviewed by Streich were hired for second shift positions without being interviewed by Michael Griffin or anyone else. Griffin testified at transcript 161–162,

⁸ I conclude that Spetnagel’s physical proximity to Clary and Spencer does not make her a “plant clerical.” Although, there may have been some degree of crossover in their duties, the record indicates that in October 2002, Clary spent almost all her day resolving failed claims and Spetnagel spent almost all day answering the telephone. There was no similarity between Spetnagel’s duties and those of Spencer.

⁹ At least some of these prescriptions are then filled by Kroger’s retail pharmacies.

without giving any specific examples, that he may occasionally decide not to hire someone who Streich recommends. However, he never decides to hire someone that Streich does not recommend hiring.¹⁰ Indeed, Streich is a supervisor simply on the basis of her power to effectively recommend against the hiring of a job applicant, *HS Lordships*, 274 NLRB 1167, 173 (1985).¹¹

Finally, due to the inconsistencies between Griffin's testimony at transcript 161–162 and Streich's testimony at transcript 278–279 and 282–283, I find Griffin's testimony regarding Streich's role in the hiring process to be incredible. I conclude that insofar as this record is concerned, Kroger hires any applicant for a second shift position who Streich recommends for hire.

Streich testified that when scheduling employees at a particular workstation, she:

... goes by the seniority and the knowledge of what they know at the refill center because the ones that have been there longer know more of what to do there so I base it on their knowledge of what they know.

Tr. 274.

Griffin testified that Streich "decides who goes in what station based on their abilities to perform those job duties at that station." (Tr. 159.) Griffin occasionally changes Streich's work schedule.

... I see a name of a person that's in a certain spot that I feel wouldn't be appropriate for a busy day, or appropriate for that position. I will ask her to redo it. That doesn't happen a lot, but it happens.

Tr. 160.

This testimony indicates that Streich uses some degree of independent judgment in deciding which employees work at which workstations on the second shift. Thus, she has far more discretion than Antonio Hernandez, who was found not to be a supervisor in *Valley Mart Supermarkets*, 264 NLRB 156, 161 (1983). Even though Griffin has, on occasion, changed Streich's schedule, I find that Streich uses independent judgment in effectively recommending the scheduling of employees.¹²

¹⁰ In this respect, Streich differs from Doyle Womack, who was found not to be a statutory supervisor in *Browne of Houston*, 280 NLRB 1222, 1225 (1986). Womack's superior subsequently interviewed applicants interviewed by Womack before they were hired.

¹¹ The cases relied upon by Respondent, for the proposition that Streich did not effectively recommend the hiring of employees, are distinguishable from the instant case. In *Anamag*, 284 NLRB 621, 623 (1987), and *Kenosha News Publishing Co.*, 264 NLRB 270, 271 (1982), as well as a similar case, *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999), management screened out applicants it did not want to hire before seeking the opinion of the nonsupervisory employees. In contrast, Streich screened out unsuitable applicants for Griffin and Race.

¹² If Streich's work schedules were not subject to any review, her exercise of judgment in drawing up these schedules would clearly make her a supervisor. However, Board precedent is not that clear as to whether any degree of review of the schedule will negate such status. I believe that where, as in the instant case, her recommendations are generally accepted with a cursory review, that her exercise of inde-

IV. ALLEGED UNFAIR LABOR PRACTICES/UNION'S OBJECTIONS TO THE ELECTION

The allegations of the complaint and the Union's objections to the election involve the same incidents. Essentially the issue before me is whether I believe three bargaining unit employees, or Facility Manager Griffin's denial of their testimony.

A. Complaint Paragraph 5/Objection #1

Tammy Wright testified that Mike Griffin called her into his office on October 8, 2002, and asked her if she would work on the first shift during the following week. At the time Wright was working second shift. Wright told Griffin that she would be willing to work both shifts if Theresa Streich would allow her to leave early on the second. Griffin then said he would talk to Streich.

Then, according to Wright, Griffin asked her what she thought of this "union stuff." Wright responded that employees needed someone to talk to. Griffin said they could talk to him. Wright replied that Griffin always sent her back to Streich, who was the source of her problems. Griffin said that if Wright came to him again, he and Wright would discuss Wright's problem with Streich together.

Wright then mentioned that she had forgotten to clock out the previous night. According to Wright, Griffin said, that's all right, I can let it go, "but if a union were here, I'd have to give you a write up."

Griffin testified as follows: Wright came into his office to discuss working first shift. She complained about Streich. When Griffin told Wright he'd like her to try again to resolve her problems with Streich on her own, she volunteered that this was why she supported the Union. Griffin concedes he was not aware of Wright's support for the Union previously.

Griffin confirms that Wright mentioned failing to clock out. However, he testified that he merely told her that he had flexibility in dealing with such transgressions. He denied telling Wright that he'd have to write her up if there was a union at the refill center.

I credit Wright's account. On cross-examination, Wright testified that she told Griffin that she was upset over the fact that the Union had filed a charge over the incident. Wright gave the impression of wanting to please everyone and I sense that she would have hedged her testimony not to make Griffin look bad if she could have done so. I also credit Wright's testimony, as opposed to Griffin's, due to Griffin's lack of candor when testifying about Spetnagel's and Streich's duties.

Moreover, Wright's testimony is consistent with the testimony of Corina Culbertson (her sister) and Sandra Moore regarding similar incidents. In this record only Moore appears to have been a vociferous advocate for the Union. I find it unlikely that all three accounts are fabricated. I find that the conversation transpired as testified to by Wright.

pendent judgment makes her a supervisor. In any event, her exercise of independent judgment regarding hiring decisions establishes her supervisory status regardless of whether she is a supervisor by virtue of her authority to schedule employees at different workstations.

B. Applicable Legal Principles

Not every inquiry by management regarding union sympathy is a violation of Section 8(a)(1). The Board applies a “totality-of-the-circumstances” test, *Rossmore House*, 269 NLRB 1176 (1984). Among the relevant factors are the presence or absence of employer hostility to the Union, whether the employer appears to be seeking information on which to base disciplinary action, the position of the questioner in the employer’s hierarchy, the place and method of interrogation and the truthfulness of the employee’s reply, *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). However, these factors are not to be mechanically applied and each factor need not be evaluated. They are merely useful starting points for assessing the “totality of the circumstances.”

In the instant case, I start my analysis with the proposition that an employee is entitled to keep from his or her employer, his or her views on unionization so that the employee may exercise a full and free choice as to whether to select the Union or not, *id.* at 942. The fact that Griffin, the facility manager, inquired as to the union sympathies of Wright, an employee who had not revealed her views to Kroger previously, in the midst of election campaign, is enough to convince me that his inquiry violated the Act in interfering with Wright’s free choice.

I also find that Griffin violated the Act in telling Wright that if employees selected the Union as their bargaining representative he would have to “write her up” for failing to clock out. An employer may accurately describe to employees the results of unionization, such as the inability to deal directly with the employee without the involvement of the union, *Insight Communications Co.*, 330 NLRB 431, 458 (2000). An employer may also describe the collective-bargaining process to employees, including the fact that the results of bargaining may result in changes in the way the employer’s establishment operates. However, when an employer, categorically states, as did Griffin, that discipline will be enforced more stringently if a union is selected, without referring to the possibility of gains and losses through the collective-bargaining process, the statement violates Section 8(a)(1), *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 495 (1995); *United Artists Theatre*, 277 NLRB 115, 121 (1985).

Griffin’s statement is a threat of unilateral action and coerced employees in the exercise of their Section 7 rights. He would not have violated the Act if he had explained that numerous working conditions, including the enforcement of Respondent’s workrules, could change for better, for worse, or not at all, through the collective-bargaining process. However, without this or a similar gloss, his statement would reasonably lead an employee to conclude that Kroger intended to tighten up on enforcement of its workrules in the event of a union electoral victory and that the one had better vote against the Union if they wanted to receive the same sort of leniency that employees enjoyed without a union, *Medicare Associates, Inc.*, 330 NLRB 935, 943 (2000).

C. Complaint Paragraph 6/Objection 2

Corina Culbertson testified that on October 10, 2002, Griffin came to her workstation to tell her that she had filled a prescription improperly. Later, according to Culbertson, Griffin told

her that if the facility had a union, he would have to write her up. However, without a union he could be lenient. Griffin denies making this statement. For the same reasons that I credited Wright, I credit Culbertson.

D. Complaint Paragraph 7/Objection 3

Moore testified that on October 11, 2002, she clocked in late after a break. When Griffin walked by she told him that she had done so. According to Moore, Griffin said that so long as she didn’t abuse her breaktime, he wouldn’t take any disciplinary action. She also testified that Griffin left her location and then returned a few seconds later. At that time, he told her that although he could overlook her clocking in late, if the facility was unionized, he would have to write her up.

Griffin contradicts the account of Moore, who is an active union supporter and who had demonstrated her support for the Union openly prior to October 11. He testified that he told Moore that he didn’t have a problem with her clocking in late because she did not have a history of doing so. Then Griffin testified that he told Moore that with the flexibility he had currently in the facility, he could use his discretion in dealing with her clocking in late.

I credit Moore, not only due to the consistency of her testimony with that of Culbertson and Wright, but because I see no reason for Griffin to discuss his “flexibility” unless he was trying to contrast his discretion with the situation that would exist if employees chose to be represented by the Union. Griffin did not testify that he explained to Moore how his flexibility could be lost through the collective-bargaining process. His comments would thus tend to leave an employee with the impression that Kroger intended to punish employees, if they chose the Union, by unilaterally tightening up on its enforcement of workrules.

CONCLUSION OF LAW

The Unfair Labor Practices

Based on the credibility determinations above, I conclude that Respondent, by Griffin, coercively interrogated Wright on October 8, 2002, and threatened Wright, Culbertson, and Moore, as alleged, with a stricter administration of discipline if employees selected the Union as their collective-bargaining representative. In doing so, Respondent violated Section 8(a)(1) of the Act as alleged.

Challenged Ballots/Objections to the Election

I recommend that the challenges to the ballots of Clary, Spencer, and Harris be overruled. Additionally, I recommend that the challenge to the ballot of Spetnagel be sustained on the grounds that she is an office clerical employee and that the challenge to the ballot of Streich be sustained on the grounds that she is a supervisor within the meaning of Section 2(11) of the Act. Even if the ballots of Clary, Spencer, and Harris are counted as having voted against representation by the Union, 14 votes will have been cast in favor of such representation and 13 against representation. Therefore, if these recommendations are adopted by the Board, the Union, United Food and Commercial Workers Union, Local 1059, should be certified as the

exclusive bargaining representative of the following employees at the Kroger Refill Center in Groveport, Ohio.

All regular full-time and part-time employees employed by the Employer at its Kroger Refill Center, 2250 Spiegel Drive, Groveport, Ohio facility, but excluding all managers, office clerical employees, pharmacists, pharmacist-interns, and all guards and supervisors as defined in the Act.

In the event that my ruling on the challenged ballots is reversed and the Union fails to receive a majority of the valid ballots cast, I recommend that the Board order a new election. The Board's policy is to set aside an election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. There is a limited exception to this policy, however, in situations where the misconduct is de minimis with respect to affecting the results of an election, *Video Tape Co.*, 288 NLRB 646 fn. 2, 665 (1989). Since several employees were affected by the violations herein and under the Union's worst-case scenario, it can only lose the election by a single vote (if all five challenged ballots are counted and all five employees vote against union representation), the violations cannot be deemed de minimis. Therefore, if the Union does not prevail on the challenges to at least two of the ballots, I conclude that its objections have sufficient merit to set aside the election of October 31, 2002.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, The Kroger Company, Groveport, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Threatening employees that the administration of discipline will be stricter if they chose a union as their collective-bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Groveport, Ohio, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ALSO ORDERED that Case 9-RC-17712 be severed and remanded to the Regional Director, who shall certify the election results.

Dated, Washington, D.C. May 14, 2003.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to administer discipline more strictly if you choose a union as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

THE KROGER COMPANY

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

